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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 739

MILTON MAY, Petitioner,
v.
THE CHASE MANHATTAN BANK,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

DAVID B. BUERGER
ROBERT L. FRANTZ
Attorneys for the Respondent
1800 Oliver Building
Pittsburgh 22, Pennsylvania

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BLVD. OF ALLIES, PITTSBURGH 19, PA.

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QUESTIONS PRESENTED

1. A written guaranty provides that loans may be made "with or without security". Under the law of New York, may a guarantor contradict the agreement by oral testimony of alleged prior or contemporaneous promises that loans were to be made only with security?

2. A written guaranty provides that the creditor may act in reliance on it until it receives written notice to the contrary from the guarantor. New York law provides that where a written agreement provides that it may not be orally modified, then it may not be orally modified. May the guarantor offer testimony that the guaranty was orally modified?

3. A guarantor claims that a creditor negligently valued collateral because one of its records did not show daily valuations. The uncontradicted evidence showed that only a second type of permanent record was used in valuing collateral for purposes of making loans. The trial judge excluded the jury while deciding whether the first record alone was admissible to prove negligence, and then held that it did not prove negligence. Did he depart from the usual course of judicial proceedings?

STATEMENT OF THE CASE

From 1940 to 1957, States Grain Corporation borrowed money from the respondent Chase Manhattan Bank, or its predecessor, Chase National Bank. The petitioner Milton May controlled States Grain and owned most of its stock; the balance was owned by his wife and trusts for his children. In 1947 the bank granted May's request to increase States Grain's line of credit from $500,000 to $2,500,000 (16b), and May signed and delivered to the bank in New York a written guaranty.

The guaranty provided that (a) the bank might make loans *with or without security;* (b) the guaranty should continue in full force until receipt by the bank of written notice not to give further accommodation; and (c) the guarantor pledged to the bank, and authorized the bank to sell, all his stocks which had been or at any time should be delivered to the bank (2a-5a). When States Grain defaulted, the bank sued May on his guaranty.

At the trial May offered to prove that, before the guaranty was signed, a bank officer orally agreed that

the bank would make loans *only with security*. The trial judge rejected the offer under the New York parol evidence rule, and the Court of Appeals approved.

At the trial May offered to prove that, after the guaranty was signed, a bank officer orally agreed that the bank would make loans *only with security*. The trial judge rejected the offer under Section 33-c of the New York Personal Property Law (petitioner's brief, p. 10), which provides that when a written agreement says it may not be changed orally, then it may not be changed orally. The Court of Appeals approved.

The bank had sold certain of May's stocks at a public sale. These stocks had been delivered to it by May's attorney. In the letter authorizing delivery of the stock to the bank, May insisted on including the words "as a pledge" (48b). In the cover letter from May's Washington attorney to his New York attorney, the former stated that May wanted those words to be sure that the stock would be "a pledge on his guarantee of 1947" (49b). At the trial the Washington attorney testified that "the purpose of pledging the stock was to show his good faith" (58b). May now contends (petitioner's brief, p. 7) that the bank had no right to sell the stocks until his liability as guarantor was determined. Although it is doubtful that this issue was properly raised before the Court of Appeals, it was correctly disposed of by both the trial judge and the Court of Appeals. The trial judge ruled that the bank had been authorized by the guaranty to sell all stocks delivered to the bank, and that this agreement could not be changed orally. The Court of Appeals approved.

At the trial May sought to show negligence of the bank in valuing States Grain's collateral. The only evi-

dence offered by May was that the bank's Record of Collateral cards, which were designed only to show the number of bushels of grain on pledge, did not show daily fluctuations in value. The only permanent bank records designed to show such daily valuations were Offering Sheets, on which collateral was valued to determine if a loan should be granted. When May offered in evidence only the Record of Collateral cards, the trial judge inquired into their nature outside the presence of the jury and then ruled that by themselves these cards had no probative value. May appealed, but agreed that this point need not be considered if the bank had the right to make loans *without security*. Since the Court of Appeals held that the bank had the right to make such loans, it did not reach the point.

The Court of Appeals affirmed a directed verdict for the bank.

ARGUMENT

1. The parol evidence rule of New York certainly presents no federal question, and the Court of Appeals has certainly not reached a decision in conflict with the courts of New York. The petitioner May contends that he was relieved from his guaranty because, he says, the respondent, Chase Manhattan Bank, made loans to his company, States Grain, without security. But the guaranty signed by May authorized the bank to make loans "with or without security" (2a). May sought to testify that, before the guaranty was signed, it was agreed that loans would be made only with security. The Court of Appeals held that such testimony was inadmissible under the New York parol evidence rule.

Petitioner accurately states that the law of New York is found in *Hicks v. Bush*, 10 N. Y. 2d 488, 180 N. E. 2d 425, that parol evidence is admissible "if the evidence does not contradict the written agreement" (p. 5). But testimony that "without or without security" means "only with security" surely does contradict the written agreement.

Then the petitioner says that this case should be argued before this Court because it concerns the interpretation of Section 33-c of the New York Personal Property Law (p. 6). That is no reason. Section 33-c provides that if a written agreement provides that it may not be modified orally, then it may not be modified orally. Accordingly, the Court of Appeals held that such a written agreement may not be modified orally. There is nothing to interpret.

2. The second reason tendered by the petitioner for granting the writ really raises the same problem.

May complains that the bank sold his stocks which he had pledged with the bank as security for his guaranty. But May specifically pledged the stocks under the guaranty and the guaranty authorized the bank to sell all stocks "which have been or at any time shall be delivered to" the bank (4a). The petitioner agrees that this instrument "is a binding contract, unless it be varied by other testimony and other writings" (p. 7).

So far as "other testimony" is concerned, if the testimony referred to conversations prior to the agreement, it is barred by the New York parol evidence rule. If the testimony referred to conversations after the agreement, it is barred by the New York statute forbidding oral modification of a written agreement which forbids oral modification.

So far as "other writings" are concerned, the petitioner agrees that when the stocks were delivered to the bank, "the words 'as a pledge' were added at May's insistence on the last written line" (p. 5). A letter declaring that stocks are delivered "as a pledge" certainly cannot be deemed to "vary" an agreement by which the pledgor pledges stocks, which were held by the bank for almost a full year after they were pledged before being offered for sale.

Again, there is no federal question or any decision in conflict with New York law.

3. The petitioner claims a deviation from the usual course of judicial proceedings. He concedes the point is irrelevant unless the bank was forbidden to make unsecured loans (pp. 7-8), so here again he is stopped by the parol evidence rule, as the Court of Appeals held. But even if the bank could not make unsecured loans, the

petitioner, to prove the bank did in fact make such loans, had to show that the bank had negligently valued collateral (pp. 7-8). The trial court ruled that the proposed evidence of negligence had no probative value.

May's trial counsel admitted (80b) that "the only proof of negligence we have" was the bank's Record of Collateral cards, which listed the number of bushels of grain on pledge, did not accurately show the day-to-day value of the grain. These cards were not supposed to show day-to-day values. When a borrower wanted money, the value of the grain on pledge would be calculated on an Offering Sheet (127b). To support his idea that Record of Collateral cards were supposed to show values, May quoted a portion of a bank officer's testimony that the figures therein were "our value" (38a). But this followed testimony that this was the valuation "at one time . . . but not necessarily when this offering was made" (38a). And he said that the "valuation of collateral" was shown only "on the offering sheet" (78b). As to this there was no contradiction, and the fact that other numbers appeared on the Record of Collateral cards, which were not used to determine whether a loan was adequately secured, did not constitute evidence of negligence in valuing the security.

The trial court committed no error in excluding the jury while determining the admissibility of evidence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID B. BUERGER
ROBERT L. FRANTZ
Attorneys for the Respondent